the cause numbered and entitled on its Docket No. 9547, Continental Insurance Company, Inc., Appellant, vs. Sabine Towing Company, Inc., Appellee; and that said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just;

And your petitioner will ever pray.

SABINE TOWING COMPANY, INC.,
Petitioner,

By M. A. GRACE,
EDWIN H. GRACE,
DANIEL H. GRACE,
JOHN D., M. A. & EDWIN H. GRACE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The memorandum opinion of the District Court holding your petitioner entitled to recover under the Protection and Indemnity policy is not reported, but is found at pages 619-620 of the record. The findings of fact and conclusions

of law are reported in 1940 A. M. C. 524. The opinion of the Circuit Court of Appeals reversing this opinion is reported in 117 F. (2d) 694.

II.

Jurisdiction.

The jurisdiction of this Court is involved under Sec. 240 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stats. 938; 28 USCA Section 347, page 359). The date of the decree of the Circuit Court of Appeals now sought to be reviewed is February 7, 1941 (R. 634).

III.

Statement of the Case.

The essential facts of the case are fully set forth in the accompanying petition for certiorari and, in the interest of brevity, are not repeated here.

IV.

Specifications of Error.

The Circuit Court of Appeals for the Fifth Circuit erred:

(1) In reversing the decree of the District Court;

(2) In not affirming the decree of the District Court;

(3) In holding that the words "fault or privity", as used in Protection and Indemnity policies, have the same

meaning as the words "privity or knowledge", as used in the Limitation of Liability Statute (46 USCA 183);

(4) In not holding that the words "fault or privity", as used in Protection and Indemnity policies, had a distinct and contrary meaning from the words "privity or knowledge" as used in the Limitation of Liability Statute (46 USCA 183);

(5) In holding that parole testimony of qualified witnesses that the words "fault or privity", as used in Protection and Indemnity policies, have a peculiar, characteristic, and recognized and well-understood meaning in the insurance trade, and the meaning so understood in such trade, was inadmissible;

(6) In not holding that the words "fault or privity" as used in the Protection and Indemnity policies meant fraud, or wilful, deliberate and intentional wrong, or negligence so gross as to amount to such, as qualified witnesses herein testified was the meaning thereof as recognized and understood in the insurance trade.

V.

Argument.

It is respectfully submitted that there arises herein an important question of law, that is the interpretation to be given a commercial contract, and one which is of extreme importance, an insurance policy covering liabilities of shipowners. In this case the District Court gave certain controlling words, "fault or privity", in the policies

the meaning that qualified witnesses testified was the meaning as was well understood in the insurance trade, and held petitioner could recover under the policies. One Circuit Judge, on appeal, agreed with the District Judge, and so interpreted the words in the policy. Two other Circuit Judges, constituting the majority of the Court sitting, gave the policy a contrary meaning than given by the District Judge and one Circuit Judge, and in so interpreting said words, held that the words had a plain and settled meaning in both popular and legal usage. That the majority court of the Circuit Court of Appeals, in giving these words such contrary meaning than given by the District Judge, held that the meaning so given by them was the same as the meaning given to the words "privity or knowledge" as used in the Limitation of Liability Statute (46 USCA 183), and therefore the assured being denied limitation under the statute was estopped from recovering under the policies. This, as stated, was contrary to the meaning as given by all American insurance men, well-qualified to testify, produced by petitioner, and also contrary to one witness, an English witness, produced by respondent.

The majority opinion has given the words "fault or privity" as used in Protection and Indemnity policies the same meaning the court says is given to the words "privity or knowledge" under the Limitation of Liability Statute (46 USCA 183). The majority opinion attempts to trace the derivation of these words to the English Limitation of Liability Statute, and which used the words "actual fault or privity", and contends that the words used in the American Statute of Limitation using the words "privity

or knowledge" have the same meaning, and that the words "fault or privity" as used in the policies are to be given the same meaning as given to the words "privity or knowledge" as used in the American Limitation of Liability Statute. The majority opinion bases their interpretation of these words, in particular, on the language used in the English decision of *Asiatic Petroleum, Ltd. v. Leonards,* Aspinall's Reports of Maritime Cases, Vol. 12, N. S. 381, a decision under the English Limitation of Liability Statute; but the majority opinion failed to consider the English decision of *Trinder Anderson & Co. v. Thames & Mersey Marine Ins. Co.,* Aspinall's Reports of Maritime Cases, Vol. 8, N. S. 373, wherein was involved an insurance claim. In this latter case the court pointed out that policies of insurance covered loss through accidental character, as distinguished from loss occasioned through the wilful act of the assured. This is the meaning given by all witnesses for petitioner, all well-qualified to give such testimony, and whose qualifications so to do were in no manner questioned by counsel for respondent or either court. The same meaning was given by one of respondent's English witnesses, a witness with over fifty years' experience in the insurance trade.

The majority opinion of the Circuit Court herein, in so construing the words, not only did not consider the parole testimony as to the meaning of these words in the insurance trade, but did not give effect to the purpose and object of the Limitation of Liability Statute as distinguished from the purpose and object of Protection and Indemnity insurance.

In *Hanover Fire Ins. Co. v. Merchants' Transportation Co.*, 15 F. (2d) 946, cert. den. 273 U. S. 758, the Circuit Court of Appeals for the Ninth Circuit, as to the purpose and object of a Protection and Indemnity policy, said:

> "The object of this form of insurance is to afford protection to shipowners, in addition to that afforded by the ordinary marine policy, and the contract should be construed with that object in view. When so construed, we are clearly of the opinion that it covered damages paid for loss of life arising from the negligence of the ship or shipowner; for, in the absence of negligence on the part of either, there would be no loss or liability to be indemnified against. And, if the policy covered loss arising from negligence, the Courts will not attempt to distinguish between the different kinds of degrees of negligence, unless, as agreed by counsel, the negligence was so gross as to amount to a wilful, deliberate, and intentional wrong.
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> "Negligence of the latter class would constitute fraud as against the company. * * *"

And in the same opinion the Court further said:

> "The right of common carriers, shipowners, contractors, physicians and surgeons, and others to protect themselves by insurance against losses arising from their own neglect, is no longer open to question; for, as said by Mr. Justice Story long ago in Waters v. Merchants' Louisville Insurance Co., 11 Pet. 213, 221 (9 L. Ed. 691): 'There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the assured to insure himself against all losses from any perils not occasioned by his own personal fraud'."

In the above case limitation of liability was denied the assured under the statute, and judgment was rendered in favor of the assured. That because the record showed that the clause limiting the insurers' liability to losses occurring without the "fault or privity" of the assured was not contained in that policy, the majority opinion of the Fifth Circuit Court of Appeals herein considered that case inapplicable. But the reasoning given by that court, if applied, would have compelled a different interpretation given these policies, and one in accord with the parole testimony offered by petitioner herein.

Also in the case of *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640, cert. den. 275 U. S. 333, the Circuit Court of Appeals for the Fourth Circuit, as to a Protection and Indemnity policy, said:

> "The learned District Judge was of opinion that, even though in ordinary cases a warranty of seaworthiness might not be implied, so as to avoid a protection and indemnity policy, such policy would be avoided where unseaworthiness existed to the privity and knowledge of the assured. We do not think, however, that privity and knowledge has anything to do with the matter unless, as said in the case of Hanover Fire Ins. Co. v. Merchants' Transportation Company, supra, the privity and knowledge arose out of negligence so gross as to amount to a willful, deliberate, and intentional wrong. Negligence ordinarily will not defeat recovery under a policy of insurance; there must be either fraud or willful exposure to known danger. Orient Ins. Co. vs. Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63; Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co., (C. C. A. 9th) 133 F. 636, 1 L. R. A.

(N. S.) 1095. Such fraud or willful exposure to danger does not necessarily exist in the privity or knowledge of unseaworthiness which will defeat limitation of liability under the statutes relating thereto. While privity and knowledge have been spoken of as more than mere negligence, it is not meant by this that they embrace necessary any element of fraud or willful exposure to danger. What is meant is that in privity and knowledge there is fault or knowledge personal to the owner, as distinguished from the negligence or misconduct of his agents, employees, or co-owners, without his knowledge or participation. Craig v. Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886; Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770; Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631; The Republic, (C. C. A. 2d) 61 F. 109; The Annie Faxon, (C. C. A. 9th), 75 F. 312; Great Lakes Towing Co. v. Mill Transportation Co., (C. C. A. 6th), 155 F. 11, 22 L. R. A. (N. S.) 769, 24 R. C. L. 1395; 36 Cyc. 417, 418.

"In the case at bar it is admitted that the lighter was unseaworthy with the privity and knowledge of the owner, but there is no admission or is there evidence to support the view that there was fraud or willful exposure to danger. On the contrary, the finding, as to privity and knowledge was based upon the failure of the superintendent to properly inspect the lighter, which had been lying light in hot weather, with the result that some of her seams had opened. There was entirely lacking any evidence of such fraud, design, or willful exposure to danger as would avoid the policy."

In the above case, limitation of liability under the statute (46 USCA 183) as in the preceding case, was denied the assured, but the assured therein recovered judgment on its Protection and Indemnity policy; but this latter case, the same as the preceding one, was not considered as applicable by the majority opinion of the Circuit Court herein, because the record therein showed that the clause, as herein involved, was not contained in the policy therein. However, the reasoning given therein for a Protection and Indemnity policy, as also given in the preceding case, was totally ignored by the majority opinion of the Circuit Court herein. That as said in the dissenting opinion of the Circuit Court in the instant case herein, that:

> "No contention is made in this case that the appellee was guilty of wanton or willful misconduct. So far as the record discloses the insured was honest and forthright in and about its business. At most it was guilty of simple negligence and bad judgment. For this dereliction this court has therefore decreed that it must pay out large sums for the loss of seamen who were on the tug. Now it is told by the majority opinion that since it was guilty of simple negligence and bad judgment it may not recover the amount of insurance carried on the vessel.
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> "The essential purpose of the policy is to protect the owner from loss that may arise through negligence in connection with the operation of its business. The construction placed upon the contested clause by the majority opinion is too narrow and virtually destroys the effectiveness of the policy of insurance. It not only places the burden of proof on the insured but also precludes recovery where even simple negligence on the part of the shipowner is shown.

"I think the holding of the District Court was the correct one."

The interpretation given the policies herein, as stated in the said dissenting opinion:

"* * * virtually destroys the effectiveness of the policy of insurance."

The majority opinion herein in so interpreting the policies, and giving the words therein contained of "fault or privity" the same meaning as the words "privity or knowledge" under the statute (46 USCA 183), did not give effect to the fact that such policies were intended to indemnify against liabilities, and without negligence there would be no liability, and that there was not involved a public law, but a contract for an agreed money consideration.

The Limitation of Liability Statute R. S. §4283 (46 USCA 183) provides as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Under this statute it has been held that the "privity or knowledge" does not have to be actual, but which may be imputed. In re: *Great Lakes Transit Corporation, Ltd. vs. Heussler* (C. C. A. 6) 81 F. (2d) 441; *Quinlan vs. Pew, et al.* (C. C. A. 1) 56 F. 111. In *The James Horan*, 10 F.

Supp. 28 aff. C. C. A. 3, 78 F. (2d) 870, the court therein denied the shipowner limitation of liability under the statute because of the privity or knowledge of an employee, a "pumpman" or "night watchman". Also in *Boston Towboat Company vs. Darrow-Mann Co.*, 276 F. 778 (C. C. A. 1), it was held:

> Privity or knowledge of the assistant manager of a towboat company, who though not an officer of the company, had the charge of management of its boats, of a custom of its barge masters to leave them unattended at night, while lying loaded in docks, held the privity or knowledge of the company.

Other citations can be cited to illustrate how far the courts have gone to hold a shipowner guilty of "privity or knowledge" under the statute, and therefore what little protection, if any, would Protection and Indemnity policies afford if the words "fault or privity" are to be given the same meaning as "privity or knowledge" under the statute.

The Limitation of Liability Statute (46 USCA 183) was passed granting to shipowners the right to limit their liability to "the amount or value of the interest of such owner in such vessel, and her freight then pending". And the object of a Protection and Indemnity policy "is to afford protection to shipowners, not afforded by the ordinary marine policy, and the contract should be construed with that object in view." *Hanover Fire Ins. Co. v. Merchants' Transportation Co., supra.*

The policies herein should be read in the light of the objects to be attained thereby. That as said by this Court in *South Chicago Coal & Dock Co. v. Bassett*, 84 L. ed.

488, in construing the application of the Jones Act to "any seaman":

> "Recently, in considering the application of the Jones Act to 'any seaman,' we adverted to the 'range of variation' in the use of the word 'crew', and it was again emphasized that what concerned us in that case, which had relation to the status of a 'master', was 'not the scope of the class of seamen at other times and in other contexts.' We said that our concern there was 'to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.' Warner v. Goltra, 293 U. S. 155, 158, 79 L. ed. 254, 257, 55 S. Ct. 46.
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> "That is our concern here in construing this particular statute—the Longshoremen's and Harbor Workers' Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering the use of the term 'crew' in other statutes having other purposes."

That as said in the dissenting opinion in the instant case:

> "* * * I think the oral testimony of qualified witnesses, such as was offered in this case; was admissible to show that the words 'fault or privity' have a recognized and well-understood meaning among underwriters and their customers, and that this characteristic meaning is different from the ordinary dictionary definition."

It would therefore appear that in construing the words "fault or privity" as contained in these policies, the aim and object of such a policy should be considered, and the meaning of such words, as used in the particular

form of policies involved, have in the insurance trade. And particularly in the instant case.

> "In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction by merchants and underwriters." *General Mutual Ins. Co. v. Sherwood*, 14 How. 352.

That in considering that the District Court herein and one Circuit Judge reached different conclusions from the two other Circuit Judges constituting the Court, as to the meaning of the words relied upon by the insurer as exempting it of liability, the assured, petitioner herein, should have been given the benefit of the resulting doubt. The application of this doctrine is analagous to the decision of this Court in *Stroehmann v. Mutual Life Ins. Co.*, 300 U. S. 435, 81 L. ed. 732, wherein, on certiorari, this Court said:

> "Examination of the words relied upon to show an exception to the Incontestability clause of the policy discloses ample cause for doubt concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reach different conclusions, and elsewhere there is diversity of opinion.
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> "The District Court accepted the view approved in Ness v. Mutual L. Ins. Co., (Fourth Circuit) 70 F. (2d) 59, and Mutual L. Ins. Co. v. Markowitz, (Ninth Circuit) 78 F. (2d) 396, which presented for interpretation language identical with that now before us. The Circuit Court of Appeals followed its earlier opinion in New York L. Ins. Co. v. Gatti, (Oct. 6, 1936), where the company employed different language. Certain life companies undertake to make

exceptions to the Incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly.

"Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. *And applying the settled rule, the insured is entitled to the benefit of the resulting doubt.*

"The decree of the Circuit Court of Appeals must be reversed. The decree of the District Court is affirmed." (Italics ours.)

It is respectfully submitted that the question involved herein, the interpretation of such an important commercial contract as an insurance policy, and especially one issued for the protection of shipowners, is deserving of consideration of this Honorable Court. That especially so, since there is involved herein an equal split of opinion between four federal judges as to the rules of construction and interpretation of the policies herein, and since the Fifth Circuit Court of Appeals is in conflict with other Circuit Courts of Appeals as to the rules of construction of commercial contracts, a decision of this Honorable Court settling the matter involved herein would be very much welcomed, and of extreme importance to the commercial world, and in particular, to shipowners.

Respectfully submitted,

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